

Attachment A

Several component exhibits follow



Warren Havens <wrrnvns@gmail.com>

SCOTUS 16-344 cert- Com. Act §§ 201, 206-208, 401, 313; Net Neutrality

Warren Havens <wrrnvns@gmail.com>

Sun, Sep 25, 2016 at 10:03 AM

To: howard.symons@fcc.gov

Cc: Richard.Welch@fcc.gov, James.Carr@fcc.gov, christopher.killion@fcc.gov, scott.marshall@fcc.gov, kristen.limarzi@usdoj.gov, Nickolai.Levin@usdoj.gov, robert.wiggers@usdoj.gov

Bcc:

[redacted in public copy]

Howard Symons
General Counsel
Federal Communications Commission

Mr. Symons,

I request that the FCC consider filing, with the United States, an amicus brief in support of grant of the cert petition described below and attached:

1. For the reasons shown directly by the Questions Presented.
2. Because a resolution of the Questions Presented by the Supreme Court is important for Net Neutrality-- *on either side*:

Net Neutrality implementation, and subjects of it, need due process remedies under 201, 206-208,* 401(b), and 313 of the Communications Act, but those are in disarray as shown by the Third Circuit's precedential decision *Havens v Mobex*, copy attached.

* See Congressional Research Service, 7-5700, Net Neutrality: Selected Legal Issues Raised by the FCC's 2015 Open Internet Order, 12, 2015:

The FCC made clear in its 2015 order which aspects of Title II will be applied to broadband Internet access services. First, the FCC declined to forbear from Sections **201**, 202, **208**, and other related provisions granting the agency enforcement power.^{34/} These provisions, along with Section 706, are necessary for the FCC's authority to impose the net neutrality rules themselves, as well as some other regulations.

^{34/} Id. ¶ 51. In addition to sections **201**, 202, and **208**, the FCC will apply sections **206**, **207**, 209, 216, and 217. Id. at FN46.

I believe Net Neutrality is a side show of the bigger problem illustrated by the last question posed below. The reason that can arise is discussed in William T. Mayton, "The Illegitimacy of the Public Interest Standard at the FCC," 38 Emory Law Journal 715 (1989) - excessive allocation of authority from Congress to the FCC by the blank-check "public interest" standard in the Communications Act leads to *endless* arbitrary and capricious actions by the agency and courts as to wtf Congress meant in various sections-- Alice in Wonderland mock court due process. That is not how the nation's communications sector should be handled. Regulate it with clear law, or deregulate and try that. I think either work if citizens and government are honest and open, and both will fail if not.

I have been involved in FCC licensing matters for decades as a means for attempting public interest work. * The situation noted above is seriously against the public interest.

Copies:

Mr. Killon and Mr. Marshall of the FCC, since they are involved in Section 208 complaints, and issues in the Questions Presented below.

US DOJ, Antitrust Div., Appellate: from a COS in *USTA v FCC*, Case No. 15-1063, DC Cir.:

kristen.limarzi@usdoj.gov

Nickolai.Levin@usdoj.gov

robert.wiggers@usdoj.gov

Back copies:

Some Parties and Amici in *USTA v FCC*

/s/

Warren Havens

* Polaris PNT, PBC

<http://polarispnt.space/#/infinite-1/>

<http://www.terranaux.com/> (archived)

Berkeley California

From: Warren Havens <wrrnvns@gmail.com>

Sent: Sunday, September 25, 2016 7:58:43 AM

To: []

Subject: Havens v Mobex, No. 16-344

....

The current federal-law-remedies:

Havens v Mobex, cert petition No. 16-344, from the USDC NJ/ Third Cir, Scotus cert petition is attached [*]

<https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles\16-344.htm>

The prior state-law remedies:

Havens v Mobex (same essential facts as above) from California state court was noted in the Scotus blog here:

<http://www.scotusblog.com/case-files/cases/havens-v-mobex-network-services/>

<https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-1518.htm>

[*] Questions Presented

FCC regulated telecommunications services are the foundation of our information age underlying all other industries, founded and protected largely upon federal court adjudication of claims by competitive carriers and consumers for (i) damage relief under 47 USC §206-208, (ii) injunctive relief

under 47 USC **§401(b)**, and (iii) damage, injunctive and preclusion relief under §1 of the Sherman Act and 47 USC **§313** from anti-competitive coconspiracy by carriers. The Third Circuit's decision at issue, marked precedential, highlights the extenuated struggle by the Circuit Courts on these forms of relief, renders them largely ineffective, and poses these questions of national importance:

1. May a federal district or circuit court reject adjudication of damage claims under Congress's straightforward language in 47 USC **¶ 206** (carriers' liability for damages for "any act...in this chapter prohibited or... for omit[ting] to do any act...required...") and **§ 207** (recovery of damages) because prior to the court action the FCC did not make a finding under 47 USC **§201** adjudication, or by general rulemaking, that the act complained of is "unjust or unreasonable," including where the court finds it "strains reason" that Congress did not intend just what it wrote, and if what it wrote were implemented federal courts would be overly burdened?
2. May a federal district or circuit court reject adjudication of an injunctive claim for violation of an FCC order under 47 USC **§401(b)** based on finding that the FCC interpretative order of a FCC rule underlying a nationwide radio service, combined with the rule, do not constitute an "order" under §401(b) due to imposing some but insufficient mandatory action, and thereby undermine the authority of the FCC and place the nationwide radio service in limbo?
3. May a federal district court deny a private action **Sherman Act §1 claim** against FCC licensed telecommunications carriers where the court finds insufficient evidence of an explicit co-conspirator anti-competitive agreement but where "plus factor" evidence demonstrates a co-conspiracy to violate FCC rules for fair competition to obtain and use the licenses, and where Congress made clear by the "**antitrust savings clause**" in 47 U.S.C. § 152 and the amendment in Pub. L. No. 104-104, § 601(b)(1) (1996), and by 47 USC **§313** which requires revocation of FCC licenses upon finding of antitrust violation, the critical importance of viable antitrust remedies in the markets for obtaining and using the licenses?
4. Given the federal law preemption of all state law remedies in this case of alleged violations of the Communications Act and Shearman [*sic*] Act, did the decisions of the district and circuit courts that found no federal law remedies exist under the subject

Communications Act and FCC rule sections
constitute deprivation of property without due
process of law under the Fifth Amendment of the
United States Constitution?

2 attachments



Havens v Mobex 2019 cert petition.pdf
165K



Havens v Mobex, Third Cir, precedential.144043p.pdf
216K

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No. 16-344

Title: Warren Havens, Petitioner
 v.
 Mobex Network Services, LLC, et al.
 Docketed: September 15, 2016
 Linked with 16A42
 Lower Ct: United States Court of Appeals for the Third Circuit
 Case Nos.: (14-4043)
 Decision Date: April 14, 2016

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

Jul 8 2016 Application (16A42) to extend the time to file a petition for a writ of certiorari from July 13, 2016 to September 11, 2016, submitted to Justice Alito.  
 Jul 12 2016 Application (16A42) granted by Justice Alito extending the time to file until September 12, 2016.  
 Sep 12 2016 Petition for a writ of certiorari filed. (Response due October 17, 2016)

~~~Name~~~~~

~~~~~Address~~~~~

~~~Phone~~~

Attorneys for Petitioner:

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 Berkeley, CA 94704

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Party name: Warren Havens

September 25, 2016 | Version 2014.2

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Supreme Court of the United States

Next Exhibit Follows

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WARREN HAVENS

Petitioner

v.

MOBEX et al.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

FCC regulated telecommunications services are the foundation of our information age underlying all other industries, founded and protected largely upon federal court adjudication of claims by competitive carriers and consumers for (i) damage relief under 47 USC §206-208, (ii) injunctive relief under 47 USC §401(b), and (iii) damage, injunctive and preclusion relief under §1 of the Sherman Act and 47 USC §313 from anti-competitive co-conspiracy by carriers. The Third Circuit's decision at issue, marked precedential, highlights the extenuated struggle by the Circuit Courts on these forms of relief, renders them largely ineffective, and poses these questions of national importance:

1. May a federal district or circuit court reject adjudication of damage claims under Congress's straightforward language in 47 USC ¶ 206 (carriers' liability for damages for "any act...in this chapter prohibited or... for omit[ting] to do any act...required...") and § 207 (recovery of damages) because prior to the court action the FCC did not make a finding under 47 USC §201 adjudication, or by general rulemaking, that the act complained of is "unjust or unreasonable," including where the court finds it "strains reason" that Congress did not intend just what it wrote, and if what it wrote were implemented federal courts would be overly burdened?

2. May a federal district or circuit court reject adjudication of an injunctive claim for violation of an FCC order under 47 USC §401(b) based on finding

that the FCC interpretative order of a FCC rule underlying a nationwide radio service, combined with the rule, do not constitute an “order” under §401(b) due to imposing some but insufficient mandatory action, and thereby undermine the authority of the FCC and place the nationwide radio service in limbo?

3. May a federal district court deny a private-action Sherman Act §1 claim against FCC licensed telecommunications carriers where the court finds insufficient evidence of an explicit co-conspirator anti-competitive agreement but where “plus factor” evidence demonstrates a co-conspiracy to violate FCC rules for fair competition to obtain and use the licenses, and where Congress made clear by the “antitrust savings clause” in 47 U.S.C. § 152 and the amendment in Pub. L. No. 104-104, § 601(b)(1) (1996), and by §47 USC §313 which requires revocation of FCC licenses upon finding of antitrust violation, the critical importance of viable antitrust remedies in the markets for obtaining and using the licenses?

4. Given the federal law preemption of all state law remedies in this case of alleged violations of the Communications Act and Sherman Act, did the decisions of the district and circuit courts that found no federal law remedies exist under the subject Communications Act and FCC rule sections constitute deprivation of property without due process of law under the Fifth Amendment of the United States Constitution?

Parties to the Proceeding

The parties before this Court are Petitioner Warren Havens, an individual (and the majority interest holder in the other plaintiffs before the district court), and Respondent Maritime Communications/Land Mobile LLC, a Delaware Limited Liability Company.¹

Because the Petitioner is an individual person, there is no parent company or publicly held company owning 10% or more of Petitioner's stock or membership interests.

¹ The other defendant entities in the caption of the Third Circuit appeal decision, App. 1, were not parties in that appeal, and the legal entity plaintiffs in that caption are not petitioners in this petition.

Table of Contents

| | Page |
|--|------------------|
| Question Presented for Review | i |
| Parties to the Proceeding..... | iii |
| This Table of Contents..... | iv |
| Index of Appendices | v |
| Table of Cited Authorities | vi |
| Petition for Writ of Certiorari | 1 |
| Opinions and Orders Below..... | 1 |
| Jurisdiction..... | 2 |
| Constitutional and Statutory Provisions Involved.... | 2 |
| Statement of the Case..... | 10 |
| Reasons for Granting the Writ..... | 12 |
| Certificate of Service..... | filed separately |

Index of Appendices

| | |
|--|----------|
| Appendix A: Opinion of the United States
Court of Appeals for the Third Circuit
(April 14, 2016) | App. 1 |
| Appendix B: Judgment of the United States
Court of Appeals for the Third Circuit
(April 14, 2016) | App. 23 |
| Appendix C: Opinion of the United States
District Court, District of New Jersey
(December 22, 2011) | App. 25 |
| Appendix D: Order of the United States
District Court, District of New Jersey
(December 22, 2011) | App. 51 |
| Appendix E: Opinion of the United States
District Court, District of New Jersey
(September 2, 2014) | App. 53 |
| Appendix F: Order and Final Judgment
of the United States Court District Court,
District of New Jersey
(September 2, 2014) | App. 121 |

Table of Cited Authorities

CASES

| | |
|---|---------------|
| <i>Havens v. Mobex</i> ,
820 F.3d 80 (3rd Cir. April 14, 2016) | <i>passim</i> |
| <i>Global Crossing v. Metrophones</i> ,
550 U.S. 45 (2007) | 13 |
| <i>Telesaurus VPC, LLC v. Power</i>
623 F.3d 998 (9th Cir. 2010),
cert. denied 132 S. Ct. 95 (2011) | 16 |

CONSTITUTIONAL PROVISIONS

| | |
|-------------|--------|
| V Amendment | ii, 16 |
|-------------|--------|

STATUTES AND REGULATIONS

| | |
|--|---------------|
| 47 U.S.C. sec. 201 | <i>passim</i> |
| 47 U.S.C. sec. 206 | “ |
| 47 U.S.C. sec. 207 | “ |
| 47 U.S.C. sec. 208 | “ |
| 47 U.S.C. sec. 301 | “ |
| 47 U.S.C. sec. 302(a) | “ |
| 47 U.S.C. sec. 313 | “ |
| 47 U.S.C. sec. 333 | “ |
| 47 U.S.C. sec. 332(c)(3)(A) | “ |
| 47 U.S.C. sec. 152, uncodified amendment
in Pub. L. No. 104-104, § 601(b)(1) (1996) | “ |
| 47 C.F.R. sec. 1.946(b)-(c) | “ |
| 47 C.F.R. sec. 1.946 | 11 |
| 47 C.F.R. sec. 1.955 | 11 |
| 47 C.F.R. sec. 22.940(a)(1)(i) | 11 |
| 47 C.F.R. sec. 80.385(b)(1) | <i>passim</i> |

OTHER

| | |
|--|----|
| Prime, Jennifer (2004) "Finding Substance
in the FCC's Policy of "Substantial Service","
Federal Communications Law Journal:
Vol. 56: Iss. 2, Article 6 | 11 |
| Amicus brief for the United States in
Global Crossing v Metrophones,
on writ of certiorari, No. 05-705, in the
Supreme Court of the United States | 13 |

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed on April 14, 2016.

Opinions and Orders Below

On December 22, 2011 the United States District Court, District of New Jersey filed its Option and Order that dismissed Petitioner's claims for injunctive and damage relief under sections 401(b) and 206-207 of the Communications Act, 47 USC §§ 401(b) and 206-207 of the Communications Act, and implementing rules and orders of the Federal Communications Commission ("FCC").

On September 2, 2014, the District Court filed its Opinion and Final Order denying Petitioner's claims under Section 1 of the Sherman Act, under many of the same factual allegations in the Complaint submitted in support of the Communications Act violations.

On April 14, 2016, the United States Court of Appeals for the Third Circuit filed its Option and Judgment upholding the District Court's dismissal of the Communications Act claims and denial of the Sherman Act claims in all respects, with additional holdings made, designating the Opinion as precedential.

Jurisdiction

The Court of Appeals' Opinion and Judgment was filed on April 14, 2016. App. 2, App. 23. Petitioner applied on July 8, 2016 for an extension of its time to file this Petition, and on Jul 12 2016, the application (16A42) was granted by Justice Alito extending the time to file until September 12, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved

Federal Constitutional Provisions

The Sixth Amendment of the United States Constitution provides, in pertinent part: "No person shall ... be deprived of ...property, without due process of law...."

Federal Statutory Provisions and Regulations

This petition involves the following sections of the Federal Communications Act of 1934, as amended ("FCA"), the Telecommunications Act of 1996, and the Sherman Act:

FCA: 47 U.S.C. Sec. 201 in pertinent part:

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful....

FCA: 47 U.S.C. Sec. 206:

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee....

FCA: 47 U.S.C. Sec. 207:

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

FCA: 47 U.S.C. Sec. 208 in pertinent part:

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts,

whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b) (1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

FCA: 47 U.S.C. Sec. 301 in pertinent part

....No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio... when interference is caused by such use or operation... upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

FCA: 47 U.S.C. Sec. 302a in pertinent part:

(a) Regulations. The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications;...

FCA: 47 U.S.C. Sec. 333:

No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this chapter or operated by the United States Government.

FCA: 47 U.S.C. Sec. 313:

(a) Revocation of licenses

All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in

restraint of trade are declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: Provided, however, That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

(b) Refusal of licenses and permits

The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or

indirectly controlled by such person) whose license has been revoked by a court under this section.

FCA: 47 U.S.C. Sec. 332(c)(3)(A) in pertinent part:

Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service....

FCA: 47 U.S.C. Sec. 401(b):

(b) Orders of Commission

If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

47 U.S.C. Sec. 152, uncodified amendment in Pub. L. No. 104-104, § 601(b)(1) (1996) in pertinent part:

[N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

Sherman Act: 15 U.S. Code § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

FCC rule: 47 C.F. R. sec. 1.946(b) and (c) in pertinent part:

(b) Coverage and substantial service requirements. In certain Wireless Radio Services, licensees must comply with geographic coverage requirements or substantial service requirements within a specified time period. These requirements are set forth in the rule part governing each specific service....

(c) Termination of authorizations. If a licensee fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically....

FCC rule: 47 C.F.R. sec. 22.940(a)(1)(i):

The renewal applicant has provided “substantial” service during its past license term. “Substantial” service is defined as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal;

FCC rule: 47 CFR §80.385(b)(1):

(b) Subject to the requirements of § 1.924 of this chapter, §§ 80.215(h), and 80.475(a), each AMTS geographic area licensee may place stations anywhere within its region without obtaining prior Commission approval provided:

(1) The AMTS geographic area licensee must locate its stations at least 120 kilometers from the stations of co-channel site-based AMTS licensees. Shorter separations between such stations will be considered by the Commission on a case-by-case basis upon submission of a technical analysis indicating that at least 18 dB protection will be provided to a site-based licensee's predicted 38 dBu signal level contour. The site-based licensee's predicted 38 dBu signal level contour shall be calculated

using the F(50, 50) field strength chart for Channels 7-13 in § 73.699 (Fig. 10) of this chapter, with a 9 dB correction for antenna height differential. The 18 dB protection to the site-based licensee's predicted 38 dBu signal level contour shall be calculated using the F(50, 10) field strength chart for Channels 7-13 in § 73.699 (Fig. 10a) of this chapter, with a 9 dB correction factor for antenna height differential.

Statement of the Case

The Third Circuit's precedential decision on the matters of the four questions presented above is concise on each such question and matter, without extraneous background factual materials or explanations and conclusions of law. Any further summary or restatement may compromise an effective statement, and thus, none is presented here. The decision is at App. 1. This decision, with the questions presented, provides an effective statement of the case.

As further background, this case, as with many carrier-to-carrier dispute cases, turns around or involves FCC rules pertaining to "construction" (or "buildout") of and operational services using the carriers' FCC radio-spectrum licenses. The FCC's primary standard for this is highly vague, leading to almost unbridled discretion, which in turn leads to rules and rule interpretive orders for construction and operation that are inadequately clear, and inequitably vary across competing radio services

(and within some of them), and that—as the Third Circuit opined in this case—ineffective for the clear obligations, rights and protections intended and needed.

This FCC “substantial service” standard is defined as “service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant a renewal.” 47 C.F.R. § 22.940(a)(1)(i).² This standard has been adopted in most commercial radio services.³

However, if the federal courts refuse, as in this case, to provide remedies based on the FCC

² The standard, as seen, is circular and contradictory, and highly vague. “Sound,” “favorable,” “substantially above,” “mediocre,” and “just might minimally warrant,” are highly vague for a technical standard. And this standard requires that the service be “*above* a level that which just might minimally warrant renewal”—but the main purpose of standard *is* what will warrant renewal, which means the service must be better than what is needed, which is circular and nonsensical. Yet this governs the threshold construction-service requirements, costs, and timing most of commercial wireless in the nation.

³ See, e.g., Prime, Jennifer (2004) "Finding Substance in the FCC's Policy of "Substantial Service"," Federal Communications Law Journal: Vol. 56: Iss. 2, Article 6.

What is "service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal"? It is the Federal Communication Commission's...definition of "substantial service." This Note attempts to make sense of this vaguely articulated, but significant, concept.... [T]he Commission has used the "substantial service"...in a variety of contexts, including the auction of commercial radio services.

rules and interpretive orders *that are the best, or in any case all, the FCC has come up with*, it creates havoc in the court-remedies foundation that Congress established, presented herein, especially since state law remedies are preempted.

That leaves no court remedies at all in such cases which will result in radio interference, waste of licensed radio spectrum, chilling of needed investment and spectrum use, and a sole forum for seeking injunctive and damage remedies-- before the FCC itself, again, not what Congress established.⁴

Reasons for Granting the Writ

In sum, this court should grant this petition (i) in order to decide the important questions posed of constitutional law, (ii) since the Third Circuit has decided important questions of federal law represented by the four questions posed that has not been, but should be, settled by this Court, and (iii) to resolve the confusion in the federal circuit courts of appeals on the majority of the questions, regarding damage and injunctive remedies under the Federal Communications Act, and where settlement of these four questions is needed for the legal-remedies

⁴ However, the FCC generally does not allow evidentiary hearings (*e.g.*, see the FCC's rules for formal hearings, 47 C.F.R. § 1.20 et seq.), lacks the resources to hold extensive hearings, has an ineffective internal appeals process (the agency reviews itself), and saddles final decisions with Chevron deference if review is sought before the DC Circuit Court. In short, Congress was wise to allow for injunctive and damage remedies in federal courts.

foundation of the nation’s telecommunications services and markets. This is presented below by stating each question presented, followed by discussion.

Question 1, repeated here, is:

“May a federal district or circuit court reject adjudication of damage claims under Congress’s straightforward language in 47 USC ¶ 206 (carriers’ liability for damages for “any act...in this chapter prohibited or... for omit[ting] to do any act...required...” and § 207 (recovery of damages) because prior to the court action the FCC did not make a finding under 47 USC §201 adjudication, or by general rulemaking, that the act complained of is “unjust or unreasonable,” including where the court finds it “strains reason” that Congress did not intend just what it wrote, and if what it wrote were implemented federal courts would be overly burdened?”

Contrary to the Third Court, petitioner’s position is that a direct reading and application of ¶¶ 206-207 is called for. This is illustrated as follows.

The United States argued in its Amicus brief before this Court in *Global Crossing v Metrophones*,⁵ on writ of certiorari, No. 05-705, in the Supreme Court of the United States (underlining added, italics in original):

⁵ Decided in *Global Crossing v. Metrophones*, 550 U.S. 45 (2007).

The Act's basic remedial provisions in Sections 206-208 make judicial and administrative remedies coextensive; if no judicial remedy lies for a failure to compensate PSPs, it is likely that no administrative remedy would lie under those provisions either. [page 9]

Congress provided further in Section 207 that "[a]ny person claiming to be damaged by *any* common carrier subject to the provisions of this chapter" may choose "*either* [to] make complaint to the Commission as hereinafter provided for [in 47 U.S.C. 208], *or* * * * [to] bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction." 47 U.S.C. 207 (emphasis added). Congress thus created an express right of action for any person against any common carrier for any violation of the Communications Act. [page 10]

Section 208 further provides (underlining added):

(a).... If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be

dismissed because of the absence of direct damage to the complaint.

The above makes clear that in a Section 208 action before the FCC, which is a coextensive remedy to a Section 206-207 action in a federal court, any claim can be made and investigated, without prior FCC determination that is a damaging violation of the Act. This should apply to said court action also, and it does by a direct reading of Sections 206-207. In this case, plaintiffs alleged violations of the Act including FCC regulations under the Act and violations the full Commission described in FCC 11-64 so severe that it was deemed to block the FCC from doing its job (extensive misleading and improper responses in an investigation of auction rule violations, and where some of those violations were admitted).

Regarding Question 2. Petitioner discuss this above at the end of the Statement section, and assert that the Circuit Court erred for those reasons. Included above are sections from the FCA that show the importance of actions by carriers to mitigate radio interference, which is the FCC purpose in the FCC rules and “cooperation orders” described in the Third Circuit’s decision. The FCC radio spectrum licensing regime is built around carrier to carrier “cooperation” to mitigate interference, since radio wavers never behave precisely. While the Circuit Court was correct that the subject rule and “cooperation orders” lacked desired clarity as to legal obligations, they nevertheless are clear to carries and all who know the overall intent and

requirements of the Communications Act. As argued in the Statement above, this is as good as the FCC came up with for this radio service and the Circuit Court erred in rejecting it as a basis of claims under 47 USC §401(b).

Regarding Question 3. Petitioner submit that a reading of the Third Circuit's decision on the Sherman Act 1 claim erred in considering that the "plus factors" were central to the competition Congress established to obtain and use FCC licenses, and for this reason, failed to give necessary weight to those plus factors and find that the district erred in determining lack of anti-competitive conspiracy.

Regarding Question 4. This question of violation of the Fifth Amendment is posed based on (i) the Third Circuit' findings of law underlying the first three questions, and (ii) the fact that state law remedies are preempted by explicit preemption under and field preemption. For example, see the preceding *Havens v. Mobex* case submitted to this court (No. 09-1518 (state law remedies preempted, and even state law claims foreclosed that were deemed ancillary to the FCC-law "gravamen" of the case, as well as *Telesaurus VPC, LLC v. Power*, 623 F.3d 998 (9th Cir. 2010), cert. denied 132 S. Ct. 95 (2011)).

For the above reasons, the petition should be granted.

Respectfully submitted,



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September 12, 2016

Next Exhibit Follows

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4043

WARREN HAVENS; SKYBRIDGE SPECTRUM
FOUNDATION, a Delaware nonprofit corporation;
TELESAURUS VPC, LLC, a Delaware Limited Liability
Company; AMTS CONSORTIUM, LLC, a Delaware Limited
Liability Company; INTELLIGENT TRANSPORTATION &
MONITORING, LLC, a Delaware Limited Liability
Company; TELESAURUS GB, LLC, a Delaware Limited
Liability Company,

Appellants

v.

MOBEX NETWORK SERVICES, LLC, a Delaware Limited
Liability Company; MOBEX COMMUNICATIONS, INC, a
Delaware corporation; MARITIME COMMUNICATIONS
LAND MOBILE LLC, a Delaware Limited Liability
Company; PAGING SYSTEMS, INC, a California
corporation; TOUCH TEL CORPORATION, a California
company; JOHN DOE Nos. 1-20

On Appeal from the United States District Court
for the District of New Jersey
(D. N.J. No. 2-11-cv-00993)
District Judge: Honorable Katherine S. Hayden
Argued on July 7, 2015

Before: FUENTES, *SLOVITER and ROTH, Circuit Judges

(Filed: April 14, 2016)

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* The Honorable Dolores K. Sloviter assumed inactive status on April 4, 2016 after the argument and conference in this case, but before the filing of the opinion. The opinion is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d) and Third Circuit I.O.P. Chapter 12.

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OPINION

ROTH, Circuit Judge:

Warren Havens and five entities under his control brought this suit against competitors Mobex Network Services, LLC, Mobex Communications, Inc., Maritime Communications/Land Mobile, LLC (MCLM), Paging Systems, Inc. (PSI), and Touch Tel Corporation for allegedly violating the Federal Communications Act (FCA) and the Sherman Antitrust Act. The District Court dismissed the two FCA claims for failure to state a claim. After a nine-day bench trial, the District Court entered judgment for MCLM on the basis that no conspiracy existed. We will affirm.

I.

A. FACTS

Marine radio providers enable vessels to communicate while on waterways and on the high seas. An Automated Maritime Telecommunications System (AMTS) station is a special type of radio station in the United States that provides communication services between land and vessels in navigable waterways. The AMTS spectrum is 217 to 218 MHz and 219 to 220 MHz.¹ Advances in wireless technology have greatly expanded the potential uses of AMTS's, including systems for public transportation safety, such as "Positive Train Control."

The FCC originally issued licenses to use AMTS-designated frequencies on a site-based system. In this system, the site is a small geographic region defined by location and the waterway served. These "site-based" licenses were provided at no cost on a first-come, first-served basis. In 2000, the FCC stopped issuing site-based licenses and began issuing AMTS licenses on a geographic basis through a competitive bidding process. Under the new procedure, the FCC divided the United States into ten regions and, at two public auctions, sold "geographic" licenses for two blocks of AMTS frequencies (A block and B block) in each region. Both site-based and geographic licensees are subject to buildout and service requirements to remain valid.²

Although geographic licensees may generally place stations anywhere within their allotted region, they may not interfere with the functioning of existing site-based stations. Specifically, 47 C.F.R. § 80.385(b)(1) requires that an "AMTS geographic area licensee must locate its stations at least 120 kilometers from the stations of co-channel site-

¹ See 47 C.F.R. §§ 2.106, 30.385.

² See 47 C.F.R. §§ 1.946(c), 1.955(a), 80.49(a)(3).

based AMTS licensees” to avoid radio interference with site-based usage. In other words, the location of a site-based station creates a gap in a geographic licensee’s coverage area in which the geographic licensee is barred from transmitting on AMTS frequencies. If a site-based license is terminated, revoked, or found invalid, however, the spectrum will revert automatically to the geographic licensee.³

Plaintiffs and defendants are holders of various AMTS licenses in the United States. Out of the twenty geographic licenses in the United States that were available at auction, plaintiffs obtained thirteen, MCLM obtained four, and PSI obtained two. None of the defendants sought to bid on licenses in the same block and region in which the other defendants held a pre-existing site-based license. But plaintiffs obtained geographic licenses in areas overlaying many of Mobex, MCLM, and PSI’s pre-existing site-based licenses. At the center of this dispute is MCLM’s refusal to disclose to plaintiffs the location of MCLM’s operating site-based stations within plaintiffs’ geographic regions. Unable to agree on who should turn over their geographic coordinates first, the parties did not exchange information. This action, along with various FCC administrative proceedings, followed.

B. PROCEEDINGS

On June 20, 2008, plaintiffs brought claims against MCLM, Mobex Network Services, PSI, and Touch Tel. The parties then agreed to dismiss the case without prejudice in light of a pending action in California state court. On

³ *See id.* § 80.385(c).

February 18, 2011, Havens filed a Second Amended Complaint under a new docket number and added Mobex Communications as a defendant. Plaintiffs assert three claims in the Second Amended Complaint. In Count I, they seek a mandatory injunction under § 401(b) of the FCA to force defendants to comply with 47 C.F.R. § 80.385 and with the directives set out in three FCC documents, which plaintiffs refer to as the “Cooperation Orders.”⁴ Specifically, plaintiffs request that the court require defendants to provide plaintiffs with the operating contours for their site-based locations that are located within plaintiffs’ geographic locations. In Count II, plaintiffs allege that defendants violated § 201(b) of the FCA by taking actions that are “unjust and unreasonable” and seek monetary damages under §§ 206 and 207. Plaintiffs also allege in Count III that defendants violated § 1 of the Sherman Act by conspiring among themselves and with non-named parties, in unreasonable restraint of trade or commerce in the AMTS market, as evidenced by defendants’ coordination of the purchase of A and B block licenses, their agreement to “warehouse” licenses by failing to construct site-based stations and by refusing to disclose the operating stations’ contours, and their false representations to the industry and the FCC.⁵

⁴ We use this term simply to refer to the documents described by Plaintiffs, and not to imply that they constitute “orders” within the meaning of § 401(b). *See infra* Part II.A.

⁵ Count III also includes claims under § 2 of the Sherman Act based on the “Essential Facilities Doctrine.” These claims were dismissed by the District Court pursuant to Rule 12(b)(6) and are not at issue in this appeal.

Plaintiffs attached the three “Cooperation Orders” to the Second Amended Complaint. The first document is an April 8, 2009, FCC declaratory ruling in response to MCLM’s request for clarification regarding § 80.385(b)(1), in which the Commission declared that a geographic licensee’s co-channel interference protection obligations should be based on actual operating parameters, rather than maximum permissible operating parameters. In a footnote, the FCC then stated: “As we noted in [a prior] decision, we expect incumbent AMTS licensees to cooperate with geographic licensees in order to avoid and resolve interference issues. This includes, at a minimum, providing upon request sufficient information to enable geographic licensees to calculate the site-based station’s protected contour.”⁶

The second Cooperation Order, dated March 20, 2009, concerns a marine radio provider’s application to modify its AMTS geographic license and PSI’s petition to dismiss the application on the basis that the geographic licensee had not afforded PSI’s site-based location adequate protection. In dismissing PSI’s petition, the FCC noted that the application had to make certain assumptions regarding PSI’s site-based location. In the immediately following footnote, the FCC then stated that “AMTS site-based incumbents are expected to cooperate with geographic licensees in order to avoid and resolve interference issues. . . . This includes, at a minimum, providing upon request sufficient information to enable

⁶ Dennis C. Brown, Esq., *Letter*, 24 FCC Rcd. 4135, 4136 n.9 (2009) (*Letter*) (internal quotations omitted).

geographic licensees to calculate the site-based station's protected contour.”⁷

The last Cooperation Order is an April 16, 2010, FCC denial of reconsideration of its declaratory ruling at issue in the first Cooperation Order. In reaffirming its decision that actual parameters should be used for determining co-channel interference protection, the FCC observed that “AMTS site-based licensees are expected to cooperate with geographic licensees in avoiding and resolving interference issues, and . . . this obligation requires, at a minimum, that the site-based licensee ‘provid[e] upon request sufficient information to enable geographic licensees to calculate the site-based station’s protected contour.’”⁸

On December 22, 2011, the District Court dismissed plaintiffs’ FCA claims pursuant to Federal Rule of Civil Procedure 12(b)(6).⁹ On Count I, the District Court held that 47 C.F.R. § 80.385 and the Cooperation Orders do not constitute “orders” under the meaning of § 401(b) because they do not require defendants to engage in any particular disclosure of their contour information. On Count II, the

⁷ *In re Applications of Ne. Utils. Serv. Co. to Modify License for Station WQEZ718*, 24 FCC Rcd. 3310, 3311 n.12 (2009) (NUSCO Order).

⁸ *In re Maritime Commc’ns/Land Mobile, LLC Warren Havens, Env’tl. LLC, Intelligent Transp. & Monitoring LLC, Skybridge Spectrum Found.*, 25 FCC Rcd. 3805, 3807 ¶ 6 (2010) (*Reconsideration Order*) (quoting *Letter*, 24 FCC Rcd. at 4136 n.9).

⁹ See *Havens v. Mobex Network Servs., LLC*, No. 11-993, 2011 WL 6826104 (D.N.J. Dec. 22, 2011).

District Court held that the FCC had not yet addressed whether the precise type of conduct at issue here was “unjust or unreasonable” and therefore plaintiffs had no private right of action under §§ 206 and 207.

MCLM subsequently moved for summary judgment on the remaining claim. Plaintiffs sought to reopen discovery pursuant to Rule 56(d). At this point, the other defendants had stopped actively litigating the case. Mobex had become defunct and had had default entered against it in February 2013; PSI and Touch Tel entered into a settlement agreement with plaintiffs on April 8, 2013. On March 20, 2014, the District Court denied both MCLM’s motion for summary judgment and plaintiffs’ Rule 56(d) motion.

The bench trial began on May 20, 2014, and proved contentious. Prior to trial, plaintiffs sought to admit 6,500 trial exhibits but then revised the list to 522 exhibits, and were eventually ordered to limit the list further. Six witnesses testified, including two plaintiffs’ experts who described advances in accident avoidance in railroad transportation. Warren Havens also testified on behalf of all plaintiffs. Additional witnesses were Sandra DePriest, MCLM founder; Donald DePriest, her husband and a communications businessman; and John Reardon, former Mobex Communications president, CEO, and general counsel. The parties also submitted excerpts of deposition testimony of David Kling, a Touch Tel engineer; David Predmore, a former Mobex Communications and Mobex Network in-house attorney; and Robert Cooper, Touch Tel’s president. The nine-day bench trial concluded on June 10, 2014.

Almost a month after the parties had submitted proposed findings of fact and conclusions of law, plaintiffs

wrote to the District Court to appraise it of “certain new and material information.” Plaintiffs attached MCLM’s responses to interrogatories served by the FCC, in which MCLM stated that it had abandoned many of its sites prior to May 12, 2012, and December 2, 2013. Plaintiffs claim that, had MCLM disclosed this previously, plaintiffs would have been significantly less hindered in their build-out plans for their geographic stations. According to plaintiffs, “the only credible reason for MCLM not so advising plaintiffs was to uphold, and keep hidden, MCLM’s contribution to its antitrust conspiracy with PSI.”

On September 2, 2014, the District Court found in favor of MCLM on the basis that plaintiffs had failed to show by a preponderance of the evidence that a conspiracy existed.¹⁰ “Put another way, were the Court as factfinder presented with [this] question in a typical verdict sheet given to the jury in a Sherman Act § 1 case, . . . the Court would answer, easily, No.”¹¹ Because plaintiffs lost on the merits, the court dismissed the default judgment against Mobex as well.

II.¹²

¹⁰ See *Havens v. Maritime Commc’ns/Land Mobile, LLC*, No. 11-993, 2014 WL 4352300 (D.N.J. Sept. 2, 2014).

¹¹ *Id.* at *30.

¹² The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337, and we exercise jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over a district court’s grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6). See *Farber v. City of*

A. PRIVATE ENFORCEMENT OF FCC ORDERS

Section 401(b) of the FCA gives private individuals an express right to enforce FCC “orders.” This provision authorizes injunctive relief for any party injured where another party “fails or neglects to obey any order of the Commission other than for the payment of money.”¹³ Plaintiffs seek a court order directing MCLM to provide them with contour information for its site-based AMTS stations. However, plaintiffs are entitled to a remedy only if the provisions of 47 C.F.R. § 80.385(b)(1) or the so-called Cooperation Orders constitute “orders” within the meaning of § 401(b).

We previously addressed the definition of an “order” under § 401(b) in *Mallenbaum v. Adelphia Communications Corp.*¹⁴ There, the plaintiffs challenged Adelphia’s monthly

Paterson, 440 F.3d 131, 134 (3d Cir. 2006). “A motion to dismiss pursuant to Rule 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997). “We review the District Court’s factual finding from the non-jury trial under a clearly erroneous standard . . .” *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 201 (3d Cir. 2005). When we are confronted with mixed questions of law and fact, however, “we apply the clearly erroneous standard except that the District Court’s choice and interpretation of legal precepts remain subject to plenary review.” *Id.*

¹³ 47 U.S.C. § 401(b).

¹⁴ 74 F.3d 465 (3d Cir. 1996).

fee to cable subscribers who received programming on more than one television set. The monthly fee was based on 47 C.F.R. § 76.923, which requires that charges for multiple outlets be based on actual cost.¹⁵ In analyzing whether the plaintiffs had an express right of action under § 401(b), we began by considering the Supreme Court's decision in *Columbia Broadcasting System, Inc. v. United States*.¹⁶ Although *CBS* interpreted a different provision of the FCA, we identified from it the general principle that "an agency regulation should be considered an 'order' if it requires a defendant to take concrete actions."¹⁷ We then outlined the circuit split in applying this principle,¹⁸ but declined to

¹⁵ *Id.* at 467.

¹⁶ 316 U.S. 407 (1942).

¹⁷ *Mallenbaum*, 74 F.3d at 468 (citing *CBS*, 316 U.S. at 416-25).

¹⁸ Currently, the Fourth, Fifth, Sixth, Seventh, and Ninth Circuits expressly or implicitly hold that "order" encompasses both FCC adjudicatory and rulemaking orders, *see Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 200-01 (4th Cir. 2013); *Alltel Tenn., Inc. v. Tenn. Pub. Serv. Comm'n*, 913 F.2d 305, 308 (6th Cir. 1990); *Hawaiian Tel. Co. v. Pub. Utils. Comm'n*, 827 F.2d 1264, 1271 (9th Cir. 1987); *Ill. Bell Tel., Co. v. Ill. Commerce Comm'n*, 740 F.2d 566, 571 (7th Cir. 1984); *S. Cent. Bell Tel. Co. v. La. Pub. Serv. Comm'n*, 744 F.2d 1107, 1115-19 (5th Cir. 1984), *vacated and remanded on other grounds by* 476 U.S. 1166 (1986), whereas, the First Circuit requires that an "order" be judicial in nature, *see New England Tele. and Tele. Co. v. Pub. Utils. Comm'n*, 742 F.2d 1, 4-8 (1st Cir. 1984). Much of this disagreement stems from the question of whether a court

choose between the two approaches because the plaintiffs lost under either test.¹⁹ Specifically, 47 C.F.R. § 76.923 does not order cable operators to charge specific rates; rather, it offers “guidelines to be followed by local franchising authorities” and “[did] not itself require particular actions to be taken by defendant Adelphia.”²⁰

As in *Mallenbaum*, we will not adopt either approach to defining “order” under § 401(b) because 47 C.F.R. § 80.385(b)(1) and the Cooperation Orders fail under both standards. For its part, § 80.385 does not address a site-based licensee’s duty to provide contour information. In fact, it is focused solely on the obligation of a geographic licensee to protect the site-based licensee’s rights by adhering to certain requirements, and imposes no obligations on site-based licensees.²¹ While the rule may “presuppose” that a site-based licensee will provide a geographic licensee its coordinates to safeguard its own interests, such an assumption cannot form the basis of an enforceable “order” under §

should rely on the Administrative Procedure Act’s definition of “order,” which is limited to “a final disposition . . . in a matter other than rule making.” *See* 5 U.S.C. § 551(6).

¹⁹ *Mallenbaum*, 74 F.3d at 468 n.5 (“We need not choose between the First Circuit and Ninth Circuit approaches, for, even assuming *arguendo* that some rules may be considered orders under § 401(b), the FCC rule at issue here may not.”).

²⁰ *Id.* at 469.

²¹ 47 C.F.R. § 80.385(b)(1) (“[E]ach AMTS geographic area licensee may place stations anywhere within its region without obtaining prior Commission approval provided: (1) The AMTS geographic area licensee must locate its stations at least 120 kilometers from the stations of co-channel site-based AMTS licensees . . .”).

401(b). Since 47 C.F.R. § 80.385(b)(1) imposes no duties on MCLM, it does not afford plaintiffs a remedy.²²

Similarly, the Cooperation Orders do not impose any obligations on MCLM. Most of the language highlighted by plaintiffs describes the FCC’s mere expectation that site-based and geographic licensees will cooperate with one another.²³ This makes sense considering that the documents were not intended to address a site-based licensee’s obligations. Like § 80.385, the Cooperation Orders describe a geographic licensee’s duty to a site-based licensee: the first and third documents provide the procedure for determining the necessary level of interference protection and the second document resolves a dispute concerning interference. Only in dicta—indeed, relegated mostly to footnotes—did the FCC describe any duty owed by site-based licensees. We do not view this language as creating any binding or enforceable requirement under § 401(b).

²² See *Mallenbaum*, 74 F.3d at 469; see generally *CBS*, 316 U.S. at 416-25.

²³ See, e.g., *Letter*, 24 FCC Rcd. at 4136 n.9 (“[W]e expect incumbent AMTS licensees to cooperate with geographic licensees in order to avoid and resolve interference issues.” (internal quotations omitted)); *NUSCO Order*, 24 FCC Rcd. at 3311 n.12 (“AMTS site-based incumbents are expected to cooperate with geographic licensees in order to avoid and resolve interference issues.”); *Reconsideration Order*, 25 FCC Rcd. at 3807 ¶ 6 (“AMTS site-based licensees are expected to cooperate with geographic licensees in avoiding and resolving interference issues . . .”).

Furthermore, even if the Cooperation Orders require MCLM to take some action, that action is not sufficiently concrete. The FCC requested that site-based licensees, “at a minimum, provid[e] upon request sufficient information to enable geographic licensees to calculate the site-based station’s protected contour.”²⁴ This language says nothing about how any alleged obligation should be undertaken: When, and in what matter, must the information be provided? In fact, the FCC described cooperation as needed “in order to avoid and resolve interference issues,”²⁵ implying that disclosure of contour information may occur only *after* an interference issue arises.

We therefore reiterate that vague statements by the FCC, particularly when made in dictum, cannot form the basis of an “order” under § 401(b). Because neither 47 C.F.R. § 80.385(b)(1) nor the so-called Cooperation Orders constitute an “order,” we will affirm the District Court’s dismissal of Count I.

²⁴ *Letter*, 24 FCC Rcd. at 4136 n.9; *NUSCO Order*, 24 FCC Rcd. at 3311 n.12; *see Reconsideration Order*, 25 FCC Rcd. at 3807 ¶ 6.

²⁵ *Letter*, 24 FCC Rcd. at 4136 n.9; *NUSCO Order*, 24 FCC Rcd. at 3311 n.12; *see Reconsideration Order*, 25 FCC Rcd. at 3807 ¶ 6; *see also In re Amendment of the Commission’s Rules Concerning Maritime Communications, Second Memorandum Opinion and Order and Fifth Report and Order*, 17 FCC Rcd. 6685, 6704 ¶ 39 (2002) (“In instances where interference occurs, we will expect the licensees to coordinate among themselves to minimize such interference and to cooperate to resolve any interference problems that may arise.”).

B. PRIVATE ACTIONS UNDER SECTION 207.

Under 47 U.S.C. § 207, any person damaged by a common carrier may either make a complaint to the FCC or sue in district court for “the recovery of the damages for which such common carrier may be liable under the provisions of this chapter.” Common carriers, such as MCLM, are liable if they “do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done.”²⁶ Plaintiffs claim that MCLM violated § 201(b), which declares that all practices in connection with common carrier service shall be “just and reasonable” and that any “unjust or unreasonable [practice] is declared to be unlawful.”²⁷

A plaintiff is not entitled to a cause of action under § 207 simply on the basis of its own determination that conduct was “unjust or unreasonable.” In *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, the Supreme Court considered whether a payphone operator could bring a federal claim under § 207 on the basis of the FCC’s determination that “a carrier’s refusal to pay the compensation ordered amounts to an ‘unreasonable practice’ within the terms of § 201(b).”²⁸

²⁶ 47 U.S.C. § 206.

²⁷ Plaintiffs identify many other FCC rules and orders that Defendants allegedly violated, but they confine their appeal to the question of whether the conduct underlying these violations was “unjust or unreasonable” under § 201(b).

²⁸ 550 U.S. 47, 52 (2007) (internal quotations omitted).

The Court held that a private lawsuit is proper under § 207 only “*if* the FCC could properly hold that a carrier’s failure to pay compensation is an ‘unreasonable practice’ deemed ‘unlawful’ under § 201(b).”²⁹ Here, plaintiffs do not rely on any regulation determining that the particular type of actions taken by MCLM were “unjust or unreasonable” under the meaning of § 201(b). Instead, plaintiffs assert that such a finding is unnecessary based on the FCA’s grant of a broad private remedy and “the Supreme Court’s intentional use of the phrase ‘*could* properly hold’ instead of ‘*did* properly hold” in *Global Crossing*.³⁰ We do not agree.

In creating § 201(b), Congress “delegated to the agency authority to ‘fill’ a ‘gap,’ *i.e.*, to apply § 201 through regulations and orders with the force of law.”³¹ Although § 201(b)’s language is certainly broad, its purpose is to empower the FCC to declare unlawful certain common carrier practices.³² Nothing in the statute implies that violations of

²⁹ *Id.* at 52-53.

³⁰ See Pls.’ Br. at 55-57 (emphasis added in brief).

³¹ *Global Crossing*, 550 U.S. at 57; see *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005) (“[Section 201(b)] give[s] the Commission the authority to promulgate binding legal rules . . .”).

³² See 47 U.S.C. § 201(b) (“All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . . *Provided*, That communications by wire or radio subject to this chapter may be classified . . . as the Commission may decide to be just and reasonable The Commission may prescribe such rules and regulations as may be necessary in

all FCC regulations amount to unjust or unreasonable practices, and plaintiffs point to no authority supporting such an interpretation. Furthermore, adopting plaintiffs' approach would "put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission."³³ It strains reason to believe that Congress intended such a result. A more common sense reading of the statute is that the FCC must first determine that a particular type of practice constitutes an "unjust or unreasonable" practice under § 201(b) before a plaintiff may bring a cause of action under § 207 on the basis of that conduct.

Although *Global Crossing* did not state that there must be an FCC ruling deeming the conduct at issue "unjust or unreasonable," an FCC determination was critical to its analysis. The Court first noted that "the FCC has long implemented § 201(b) through the issuance of rules and regulations."³⁴ It then considered the more "difficult question" of "whether the particular FCC regulation . . . lawfully implements § 201(b)'s 'unreasonable practice' prohibition."³⁵ Applying the *Chevron* framework, the Court held that the FCC properly implemented § 201(b) due to its reasonable determination that failure to abide by its rate

the public interest to carry out the provisions of this chapter.").

³³ *N. Cnty. Comm'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1158 (9th Cir. 2010) (internal quotations omitted).

³⁴ *Global Crossing*, 550 U.S. at 53.

³⁵ *Id.* at 54-55.

determinations was an unjust or unreasonable action.³⁶ In other words, the question of lawful implementation was premised on there being an FCC finding in the first place. Moreover, the Court carefully limited its holding by stating that not “every violation of FCC regulations is an unjust and unreasonable practice.”³⁷ Although the Court used the phrase “if the FCC could properly hold” instead of “if the FCC did properly hold,” its emphasis in the sentence—and throughout the opinion—was on “*if*” the FCC’s determination was proper.³⁸ We therefore do not agree that, by using one turn of phrase, the Court sanctioned such an expansive reading of the FCA.

We will affirm the District Court’s dismissal of Count II because plaintiffs do not identify any particular actions taken by MCLM that have been determined by the FCC to be unreasonable or unjust. Therefore, plaintiffs do not possess a private right of action under § 207.³⁹

³⁶ *Id.* at 55-57; *see id.* at 60 (“[T]he FCC properly implements § 201(b) when it reasonably finds that the failure to follow a Commission, *e.g.*, rate or rate-division determination made under a *different* statutory provision is unjust or unreasonable under § 201(b).”).

³⁷ *Id.* at 56.

³⁸ *See id.* at 53 (“Insofar as the statute’s language is concerned, to violate a regulation that lawfully implements § 201(b)’s requirements *is* to violate the statute.”).

³⁹ The FCC need not have declared a particular defendant’s actions unreasonable in a prior adjudication. In *Demmick v. Cellco Partnership*, Verizon argued that claims under § 201(b), prior to being filed in federal court, “must be brought to the Federal Communications Commission . . . for a

C. CONCERTED ACTION.

Section 1 of the Sherman Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”⁴⁰ “The existence of an agreement is the hallmark of a Section 1 claim.”⁴¹ For liability under § 1 to exist, there must be a “unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement.”⁴² This can be shown by putting forth direct evidence of concerted action, such as “a document or conversation explicitly manifesting the existence of the agreement in question,”⁴³ or circumstantial evidence of

determination regarding the reasonableness of the challenged conduct.” No. 06-2163, 2011 WL 1253733, at *2 (D.N.J. Mar. 29, 2011). The court rejected this argument based, in part, on the fact that there was no prior adjudication in *Global Crossing*. *Id.* at *4-5. But, in *Global Crossing*, the FCC announced through general rulemaking that a particular type of practice was unjust or unreasonable. This, too, is all our holding today requires in order to maintain a cause of action.

⁴⁰ 15 U.S.C. § 1.

⁴¹ *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999).

⁴² *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994) (internal quotations omitted).

⁴³ See *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010).

conscious parallel conduct and other “plus factors.”⁴⁴ The term “plus factors” refers to circumstances demonstrating that the wrongful conduct “was conscious and not the result of independent business decisions of the competitors.”⁴⁵

Plaintiffs’ direct evidence of concerted action at trial was an alleged agreement that was reached during a conversation over twenty-five years ago between Touch Tel’s president Cooper and a businessman named Fred Daniel. Daniel is the founder of Regionet, a marine radio provider that was later acquired by Mobex. According to plaintiffs, Cooper and Daniel agreed to split up the market for geographic licenses, whereby Regionet would only bid on A block licenses and PSI and Touch Tel would only bid on B block licenses. Plaintiffs further alleged that knowledge of this conspiracy passed to Mobex employees after Regionet was acquired in 2000, and then to MCLM after it purchased Mobex’s licenses in 2005. Plaintiffs also sought to prove the existence of concerted action by virtue of certain plus factors, including that defendants refused to provide contour information, did not construct or operate their stations, and took actions not in their individual economic interests.

On appeal, plaintiffs mainly quibble with the District Court’s conclusion that no agreement existed. Notably absent from this discussion is any recitation or application of the clearly erroneous standard of review, which must guide our analysis. A finding of fact is clearly erroneous only if it is “completely devoid of minimum evidentiary support

⁴⁴ See *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 & n.11 (3d Cir. 2004).

⁴⁵ *Baby Food*, 166 F.3d at 122.

displaying some hue of credibility or bears no rational relationship to the supportive evidentiary data.”⁴⁶ In an extensive 59-page opinion, the District Court examined all of the evidence and provided more than ample support for its conclusion that no concerted action existed. The District Court first found that Daniel and Cooper’s early conversation illustrated only “a course of action that Daniel and his company intended to take, which arguably warned Cooper off of pursuing the same course” and did not amount to direct evidence of market-allocation.⁴⁷ As to any evidence that such an agreement continued, the District Court found the evidence speculative, only showing an opportunity for, not the existence of, an unlawful agreement.⁴⁸ Lastly, the District Court determined that the alleged plus factors did not amount to evidence that a meeting of the minds existed.⁴⁹ We find no clear error in the District Court’s factual findings.

Plaintiffs argue that the District Court applied an improper standard of proof in its treatment of the plus factors. Specifically, plaintiffs cite cases in which we found that the sharing of confidential information between horizontal competitors could indicate that a conspiracy existed.⁵⁰ But, in those cases, we were asked to review a district court’s grant of summary judgment, when the facts must be viewed in the

⁴⁶ *Berg Chilling Sys., Inc. v. Hull Corp.*, 369 F.3d 745, 754 (3d Cir. 2004) (internal quotations omitted).

⁴⁷ *Havens*, 2014 WL 4352300, at *17.

⁴⁸ *See id.* at *20-22.

⁴⁹ *See id.* at *22-30.

⁵⁰ *See, e.g., Flat Glass*, 385 F.3d 350; *Baby Food*, 166 F.3d 122; *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993).

light most favorable to the non-moving party and all reasonable inferences must be drawn in that party's favor. In other words, we held that the sharing of confidential information *may* be evidence of a conspiracy, not that it *must* be. Here, the District Court properly denied summary judgment and allowed the claims to proceed to trial. At trial, the court was then tasked with evaluating the credibility of the witnesses and weighing the evidence that plaintiffs actually put forth. The court's findings were made on this basis.

Plaintiffs claim that the District Court erred further by crediting the testimony of MCLM's key witnesses despite plaintiffs' after-trial submission, which allegedly demonstrates that those witnesses lied at trial. As a preliminary matter, plaintiffs do not clarify how the District Court should have treated this evidence. They included no formal request for relief in their August 22, 2014, letter, seeking only consideration of MCLM's interrogatory responses as additional evidence of conspiracy. It appears that the District Court did just that but was not persuaded. And rightfully so: Rather than offering "new and material" information, this submission repeated the same unsubstantiated and largely irrelevant arguments plaintiffs made at the bench trial. We therefore find no clear error in the District Court's decision to credit the testimony of MCLM's witnesses.

III. CONCLUSION.

For the foregoing reasons, we will affirm the District Court's dismissal of Counts I and II pursuant to Rule 12(b)(6) and its entry of judgment in favor of MCLM on Count III.